Office - Supreme Court, U.S.
FILED
AUG 31 1984
ALEXANDER L. STEVAS,
CLERK

No. 83-1814

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1983

VOLKSWAGEN OF AMERICA, INC.,
Petitioner,

vs.

SUPERIOR COURT OF CALIFORNIA,
CITY AND COUNTY OF SAN FRANCISCO
(JOAN NOSSE, et al., Real Parties in Interest)
Respondents.

On Appeal From The Supreme Court of California

MOTION TO DISMISS APPEAL

(Or In The Alternative To Affirm The Judgment Of The California Court of Appeal)

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INTRODUCTION

Petitioner framed two "Questions Presented" in its Jurisdictional Statement:

> (1) Does California Civil Code Section 1781(d) [the provision of the California Consumer Legal Remedies Act setting forth the basis on which a California trial court may order notice in connection with the maintenance of a class action] violate the Due Process Clauses of the Fifth and Fourteenth Amendments of the Constitution of the United States when applied to require notice of the pendency of a class action by

publication only, even to members of a class of plaintiffs whose names and addresses can be ascertained with reasonable effort? and

(2) Does the same California Civil Code section violate the Due Process Clauses of the Fifth and Fourteenth Amendments to the Constitution of the United States when applied to require a defendant opposing the class to pay substantial costs of notice to the class prior to any determination of liability and without hope of reimbursement if defendant prevails or if class certification is limited or rescinded?

Neither question is properly raised in the litigation which petitioner seeks to bring before this Court. Indeed, the artful manner in which both questions have been phrased by Petitioner misrepresents the true state of the record below and misconstrues significant provisions of the state statutory scheme upon which the trial court founded its order for notice to the class. When the record is properly set forth and the state statutory scheme properly described, the Petitioner's proffered claim of constitutional deprivation disappears.

Respondents move this Court to dismiss this appeal and/or deny a writ of certiorari for the following reasons:

On the first question, no justiciable federal issue is presented:

(a) Factually, the issue is manufactured, because the record fails to indicate that the names and addresses of absent class members can be ascertained with reasonable effort.

(b) The issue is premature since the California trial court has issued no order that binds or purports to bind any absent class member and may never do so in the future;

(c) The issue is premature since under the California statutory scheme, as interpreted by California courts, the notice ordered by the trial court does not as a matter of course require that any subsequent trial court orders or judgments will have *res judicata* effect over absent class members; and

(d) Petitioner lacks standing to assert any purported violation of due process rights on behalf of absent class members whom it does not represent and to whom its interests are avowedly hostile.

On the second question, Petitioner's claim that it has been permanently deprived of its property is not supported by the record, and no substantial federal question is presented by the trial court's order apportioning the *initial* cost of notice:

(a) (1) Petitioner's claim of permanent deprivation of property is not supported by the record since California law provides that cost of notice is recoverable should Petitioner prevail; (2) there is absolutely no evidence in the record that Respondents would be unable to satisfy a cost judgment in the amount of notice costs advanced by Petitioner; and (3) Petitioner cannot complain of a permanent deprivation when Petitioner failed to affirmatively seek an order requiring Respondents to post security;

(b) The trial court's order requiring Petitioner to advance a portion of the cost of notice to absent class members pendente lite presents no substantial federal question since (1) the order was entered after two noticed hearings at which Petitioner had full opportunity to present any evidence and argument it wished; and (2) Petitioner failed at these hearings to avail itself of a statutory opportunity for additional hearings; and

(c) The trial court's order apportioning the initial cost of notice presents no substantial federal question since Petitioner received more than due process required before being temporarily deprived of its property.

For the above stated reasons, Petitioner's appeal should be dismissed pursuant to Rule 16 of this Court.

ARGUMENT

I

THE TRIAL COURT'S NOTICE ORDER PRESENTS NO JUSTICIABLE FEDERAL ISSUE TO THIS COURT CONCERNING THE SUFFICIENCY OF NOTICE TO ABSENT CLASS MEMBERS

A. The Record Does Not Support Petitioner's Assertion That The Names And Addresses Of A Substantial Number Of Class Members Are Readily Ascertainable

Petitioner claims that notice to absent class members by publication here is constitutionally inadequate for the "50,000 or more class members who are identifiable through reasonable effort." The portion of the record cited by Petitioner does not support its assertion that the names

and addresses of *any* actual class members are reasonably ascertainable:

> I know of no listing or database maintained by [Petitioner] VWoA or any other entity, from which the identities of all, or even a substantial portion of such persons can be identified and located. Conversely, every database known to me which might include some person within the class includes numerous persons who are not within the class.

Affidavit of John von Hollen, retail coordinator for Petitioner, paragraph 3. (Petitioner's Jurisdictional Statement p. 82a)

The trial court's order provides for notice to be published in a quarter-page display announcement in at least one general circulation newspaper in every county in the State of California. The newspapers carrying the notice have a combined circulation in excess of 2.8 million readers. The trial court's order requires publication in the two major newspapers in the Los Angeles metropolitan area and the four largest newspapers in the San Francisco Bay Area, the two largest population centers in the state. (See Appendix A, Declaration of Samuel A. Krantz)

In light of the von Hollen affidavit, the record is devoid of any evidence of better means of notice, and Petitioner did not provide the trial court with any.

From Petitioner's Jurisdictional Statement, it is not clear that Petitioner can segregate the names of any potential class member from its database. It is unclear whether Petitioner proposes a mailing to every person in the database (at Respondents' expense) on the hypothetical assumption that some of the names may turn out to be class members. The only evidence that Petitioner's database now con-

tains the names of *any* ascertainable class members is the conjecture of Mr. von Hollen that there may still be original purchasers of the cars who have not changed addresses since purchase. (von Hollen affidavit, ¶ 9, at p.83a.)

If Petitioner desired the trial court to entertain notice by mail, it was required to present evidence that the names and addresses of class members were reasonably ascertainable. It did not, and its belated suggestion now should not be heard for the first time by this Court. The Court should decline to consider the merits of an issue not presented by the record with sufficient clarity to enable a decision. *Gilbert v. State of California,* 388 U.S. 263, 18 L.Ed.2d 1178, 87 S.Ct. 1951 (1967); *Mishkin v. State of New York,* 383 U.S. 502, 16 L.Ed.2d 56, 86 S.Ct. 958 (1966).

Petitioner's appeal/petition for certiorari should be dismissed.

B. The Question Of Adequate Notice Under Due Process Standards Is Premature

At this stage, absent class members have received no notice at all. Neither has the California trial court issued any order purporting to bind any absent class member, or affect in any way the rights of any absent class member. Consideration of the due process rights of absent class members at this juncture in the proceedings is premature and contradicts criteria established by this Court for taking a case under review.

Further, no absent class member may ever be affected in the future by any trial court order. Under California law, the trial court may at any juncture decertify the class. *Occidental Land, Inc. v. Superior Court (Fahnestock, Real Party),* 18 Cal.3d 355, 134 Cal.Rptr. 388, 556 P.2d 750

(1976). Such decertification would remove subject matter jurisdiction over the claims of absent class members against Petitioner. Alternatively, the trial court could at some future point dismiss the class action without affecting the rights of absent class members in any fashion. *Marcarelli v. Cabell,* 58 Cal.App.3d 51, 129 Cal.Rptr. 509 (1976); *La Sala v. American Savings & Loan Association,* 5 Cal.3d 864, 97 Cal.Rptr. 849, 489 P.2d 1113 (1971).

Therefore, consideration of due process rights of absent class members at this juncture is entirely theoretical, no due process rights having yet arisen and their future existance being purely speculative. Determination of the constitutionality of legislation in advance of its immediate adverse effect in the context of a concrete case involves too remote and abstract an inquiry for the proper exercise of the judicial function. *International Longshoremen's & Warehousemen's Union v. Boyd,* 347 U.S. 222, 98 L.Ed. 650, 74 S.Ct. 447 (1954). The Court should decline to entertain issues on appeal or through writ of certiorari where those issues represent only a hypothetical situation and not an actual controversy grounded in real, historical events.

Petitioner's appeal/petition for certiorari should be dismissed as premature.

C. The Question of Adequate Notice Under Due Process Standards Is Premature Since Under California Law Notice By Publication To Absent Class Members Does Not Necessarily Establish Jurisdiction Over Those Members Of The Class Who Could Be Reached By More Direct Forms Of Notice

Petitioner in its Jurisdictional Statement singles out one passage from the lengthy California Consumer Legal Remedies Act and one order from the California Superior Court,

and artfully counterbalances these against this Court's holdings in *Mullane v. Central Hanover Bank,* 339 U.S. 306, 94 L.Ed. 865, 70 S.Ct. 652 (1950), and *Eisen v. Carlisle & Jacquelin,* 417 U.S. 156, 40 L.Ed.2d 732, 94 S.Ct. 2140 (1974) ("Eisen IV") to suggest a gross violation of the due process rights of absent class members. Upon adequate review of the entire California statutory scheme and a less selective culling from the record, it becomes apparent that no substantial federal question is presented and that no question of notice is presently ripe for adjudication.

The stated purposes of the California Consumer Legal Remedies Act (California Civil Code §§ 1750-1784)

> are to protect consumers against unfair and deceptive business practices and to provide efficient and economical procedures to secure such protection.

(California Civil Code § 1760.)

The Legislature specifically provided a class action mechanism under the Act to enable those persons whose individual claims were not large enough to justify separate litigation but which were representative of the claims of a large number of consumers to have a forum available to litigate the dispute. *Vasquez v. Superior Court,* 4 Cal.3d 800, 817, 94 Cal.Rptr. 796, 484 P.2d 964 (1971). The legislature selected the class action device as an effective and economical method for policing the consumer market place.

The legislature also provided that, for the class action device to be effective, California courts be given the flexibility to ensure that a class action could be maintained to resolve a consumer dispute for practical purposes, even though the final judgment would not be binding on all class members for theoretical purposes. Hence, the Consumer

Legal Remedies Act does not make the trial court's ability to issue a judgment binding on all absent class members a precondition to maintenance of a class action. *Cartt v. Superior Court,* 50 Cal.App.3d 960, 968-969, 124 Cal.Rptr. 376, 381-382 (1975).

In this respect, class actions brought under the California Consumer Legal Remedies Act differ substantially from those brought in federal courts under F.R.C.P. Rule 23. This Court's statement in *Eisen IV*:

> [I]ndividual notice to identifiable class members is not a discretionary consideration to be waived in a particular case. It is, rather, an unambiguous requirement *of Rule 23.* As the Advisory Committee's note explained, the Rule was intended to insure that the judgment, whether favorable or not, would bind *all* class members who did not request exclusion from the suit.

Eisen v. Carlisle & Jacquelin, 417 U.S. at 177, 40 L.Ed.2d at 748 (emphasis added), should be compared with the California judiciary's explication of the notice requirements of the California Consumer Legal Remedies Act:

> [W]e can readily accept, for the sake of argument, that *Eisen IV* defines, as a matter of constitutional law, the type of notice that is required to insure that the result of the class action is binding on all members. It simply does not follow, however, that a state may not permit a class action to go forward unless defendant can be assured in advance that in the event of a defense victory all members of the class will be foreclosed from further proceedings. A defendant who in one way or another victimizes hundreds of thousands, has, after all, no constitutional right to be subjected to only one lawsuit. This is not to say that the integrity of class action process does not demand that it settle the dis-

> pute for all practical purposes: that the entire class' complaint is adjudicated *de facto,* if not *de jure.* The class action plaintiff cannot be permitted to use the process of the superior court to pursue a justice court action masquerading as a consumer class suit. Just how this goal of practical res judicata shall be furthered is, however, not a matter of federal constitutional concern as such: rather, it is the business of the state which furnishes the forum for the class action.

Cartt v. Superior Court, 50 Cal.App.3d at 968. *See also York v. Texas,* 137 U.S. 15, 34 L.Ed. 604, 11 S.Ct. 9 (1890).

California law distinguishes between an "ascertainable class" and the necessity of identifying the individual members of such class:

> A finding of a community of interest this time may provoke later questions as to the res judicata effect of any judgment herein. However, as Witkin says: "[A] distinction is sometimes drawn between the maintenance of the suit and its binding effect on the absent parties. A sufficient pleading of the conditions may withstand a demurrer and satisfy the court that the action should proceed. But if the judgment is thereafter collaterally attacked by an absent party, a more careful scrutiny of its representative character may be made in determining whether it is res judicata."

Daar v. Yellow Cab, 67 Cal.2d 695, 706, 63 Cal.Rptr. 724, 732, 433 P.2d 732 (1967).

Eisen IV established a rule for notice to absent class members as required by F.R.C.P. Rule 23. While Rule 23 requires that a maintainable class is one where all absent class members will be bound by the judgment of the court and sets a standard for notice to insure that outcome, there is no federal constitutional requirement that a state class action, to be maintained, must attempt to bind *all* absent

class members. Rather, this Court has stated that the Fourteenth Amendment does not compel states to adopt federal rules for establishing the conclusiveness of judgments in class suit. *Hansberry v. Lee,* 311 U.S. 32, 42, 85 L.Ed. 22, 27, 61 S.Ct. 115 (1940).

Here, the California trial court's notice order does not purport to establish *in personam* jurisdiction over all persons in the named class. To the contrary, the order is designed to promote effectively the purposes of the Consumer Remedies Act that the litigation may be resolved for practical purposes, economically and efficiently. Since the order does not purport to bind absent class members for whom more direct notice might be provided, Petitioner's claim that the order violates due process standards for notice required to affect the rights of absent class members is illusory, rendering the issue presented hypothetical and premature.

The Petitioner's appeal/petition for writ should be dismissed.

D. Petitioner Lacks Standing To Assert Due Process Rights Of Absent Class Members Whom It Does Not And Cannot Represent

Although Petitioner complains that the trial court's order does not give adequate notice to absent class members, Petitioner is neither an absent class member itself nor an adequate representative of absent class members. Petitioner therefore has no standing to complain about the adequacy of the notice order.

A federal court cannot pronounce any state statute void because irreconcilable with the Constitution, except as it is called upon to adjudge the legal rights of litigants in actual

controversies. *Baker v. Carr,* 369 U.S. 186, 204, 7 L.Ed.2d 663, 82 S.Ct. 691 (1962). It is incumbent upon the Petitioner to allege such a personal stake in the outcome of the controversy as to assure the concrete adversariness which sharpens the presentation of issues upon which the court so largely depends for illumination.

A defendant in a class action does not have a personal stake in the adjudication as to whether notice to absent members of the plaintiff class is consistent with due process. *Zablocki v. Redhail,* 434 U.S. 374, 380 n. 6, 54 L.Ed.2d 618, 627 n. 6, 98 S.Ct. 673 (1978).

Nevertheless, Petitioner claims that the due process rights of absent class members are violated by the notice order, citing *Schroeder v. City of New York* 371 U.S. 208, 9 L.Ed.2d 255, 83 S.Ct. 279 (1962) and *Mullane v. Central Hanover Bank & Trust Co.* 339 U.S. 306 (1950). Both cases cited by petitioner were brought by or on behalf of the parties to whom the notice was directed. Whatever the ultimate interest of absent class members may be in the type of notice afforded them should the trial court eventually issue an order attempting to bind them or affect their rights in some way, none of those absent class members are petitioning this Court now.

Petitioner asserts that it has opposed the class, and there is no question that its interests are hostile to the interests of any absent class member. Under these circumstances, Petitioner hardly has such a personal stake in the controversy that it can be an effective advocate for the rights of those to whose interests it is opposed. Under established principles of federal jurisdiction, petitioner lacks standing to assert the rights of absent members of the class.

II

PETITIONER'S CLAIM THAT NOTICE COSTS HAVE BEEN APPORTIONED IN VIOLATION OF PETITIONER'S DUE PROCESS RIGHTS HAS NOT BEEN PROPERLY PRESERVED AND PRESENTS NO SUBSTANTIAL FEDERAL QUESTION

A. The Record Does Not Support Petitioner's Claim Of Permanent Deprivation Of Its Property Since The Cost Of Notice To Be Advanced By Petitioner Is Recoverable, The Record Is Devoid Of Evidence That Respondents Could Not Satisfy Such A Judgment For Costs, And Petitioner Failed To Affirmatively Seek Security For Its Advancement Of Costs

The cost of notice ordered by the California trial court is a recoverable cost under California Code of Civil Procedure § 1032.8. *Civil Service Employees Insurance Company v. Superior Court,* 22 Cal.3d 362, 378, 149 Cal.Rptr. 360, 584 P.2d 497 (1978). Hence, should Petitioner prevail, Petitioner may recover its share of the cost of notice to the class as a cost of suit. A cost judgment is as enforceable as any other court judgment. California Code of Civil Procedure §§ 680.150, 685.040, 685.090.

The record contains no evidence that Respondents could not satisfy such a judgment. Respondents are not indigent. They have each been able to purchase one of Petitioner's automobiles costing in excess of $4,000.00. Petitioner's claim that among the six named plaintiffs in the action Petitioner would not be able to recoup the money it will advance for notice costs is speculative at best.

Respondents did state to the trial court that, given the size of their individual claims, they were unable to pay the full cost of notice. This is only understandable, and is a common situation in those consumer class actions where the

class is large and the average individual claim modest. However, it does not flow from Respondent's cash-flow inability to advance the cost of notice that Petitioner's portion of the notice cost will be uncollectable, and the record is devoid of any evidence from which such a conclusion could be drawn.

If Petitioner had been genuinely concerned that Respondents will not be able to satisfy a judgment for costs, Petitioner could have moved the trial court for an order requiring Respondents to post security as a condition for apportioning the cost of notice. That it failed to do so does not now confer jurisdiction on this Court to rectify a tactical error on Petitioner's part below.[1]

Therefore, the record presented to this Court does not support Petitioner's assertion that the initial apportionment of cost of notice is a permanent deprivation of its property. At this point, there will be no more than a temporary deprivation.

B. The Trial Court Held Two Noticed Hearings Where Petitioner Was Able To Present Any Evidence And Argument To The Court Prior To The Court's Issuing Its Notice Order And The Consumer Legal Remedies Act Provides The Opportunity For Additional Hearings Of Which Petitioner Did Not Avail Itself

California Civil Code Section 1781(c) sets forth the criteria which must be met for an action to be maintained

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[1]During lower court proceedings Petitioner raised merely the possibility that the court could require Plaintiffs to post a bond, and Petitioner did so only once, in a footnote on page 14 of its Memorandum of Points and Authorities in Response to Plaintiffs' Motion for an Order Regarding Notice to Class and Allocation of Cost of Notice. See Appendix B, p. A-11.

as a class action under the California Consumer Legal Remedies Act. That section provides in pertinent part:

> (c) If notice of the time and place of the hearing is served upon the other parties at least ten (10) days prior thereto, the Court shall hold a hearing, upon motion of any party to the action which is supported by affidavit of any person or persons having knowledge of the facts, to determine if any of the following apply to the action:
>
> (1) A class action pursuant to subdivision (b) is proper.
>
> (2) Published notice pursuant to subdivision (d) is necessary to adjudicate the claims of the class.
>
> (3) The action is without merit or there is no defense to the action.

The statute specifically provides Petitioner with the opportunity to demonstrate that this action is without merit. Such a motion, akin to a motion for summary judgment, may be brought by a defendant to rid itself of a class action even before notice is provided to absent class members. While judgment dismissing the action would not bind the unnoticed members of the class, California procedure (in contrast to F.R.C.P. Rule 23 procedure) recognizes that offering such a practical end to the class litigation will result in substantial judicial economy and substantial benefits to the party defending against the class. Such a procedure allows the defendant the possibility of resolving the litigation on its merits in favor of the defendant prior to incurring the expense, delay and potential notoriety associated with notice to absent class members. *Civil Service Employees Insurance Company v. Superior Court,* 22 Cal.3d at 373. Petitioner did not avail itself of this opportunity in the trial court.

Respondents did move the trial court for an order that the case proceed as a class action. At this noticed hearing, Respondents put before the court evidence sufficient to establish a prima facie case of liability, including affidavits of purchasers of Petitioner's automobiles and affidavits of experienced automobile mechanics familiar with the problems caused by valve stem seals in Petitioner's 1975-1979 automobiles. Most importantly, Respondents presented to the trial court documents containing admissions of Petitioner to its own authorized dealers that the original valve stem seals had caused substantial owner complaints regarding excessive oil consumption, and that these complaints could be satisfied by replacement of the original valve stem seals with seals of new design. (See Appendix C, pp. 17-21 of Appendix 12 to Defendant's Petition for Writ of Mandate and Memorandum in Support Thereof.)

At this hearing for class certification Petitioner had full opportunity to present any evidence it wished (either demonstrative evidence or testimony through affidavits) in order to persuade the trial court that the action should not be maintained as a class action or was without merit. The trial court ruled that some but not all of Respondent's claims could be maintained in class form.

Following the motion for class determination, Respondents brought a noticed motion on the issues of notice and apportionment of notice costs presently before this Court. Additionally, factual material was presented to the Court to support Respondents' argument that notice costs should be borne by Petitioner, including the existence of an ongoing FTC investigation into faulty valve stem seals in Petitioner's 1975-1979 automobiles. Petitioner appeared at

this second hearing and vigorously presented its opposition to a preliminary apportionment of notice cost.

Moreover, Petitioner has always had the opportunity to move the trial court for an order that Respondents post security or bond as a condition of Petitioner's advancing a portion of the cost of notice. No California statute or decisional law prevented Petitioner from affirmatively seeking such relief from the court below. Petitioner failed to do so. (See p. 14, ftn. 1.)

Despite this substantial record of due process hearings and Petitioner's failure to seek affirmative relief in the form of a bond as security, Petitioner asserts that it was denied procedural due process by the trial court's ordering preliminary apportionment of the cost of publication.

Having failed to seek the appropriate relief from the trial court, Petitioner cannot successfully plead a permanent taking of its property in this Court. Indeed, the best that the record demonstrates is that Petitioner has been ordered to advance a portion of the cost of notice, a recoverable cost of suit, after two noticed hearings at which Petitioner had full opportunity to present its case.

C. The Court's Order Apportioning The Initial Cost Of Notice—A Recoverable Cost Of Suit—Fully Satisfies Due Process Standards Set Forth By This Court For A Temporary Deprivation Of Property And Therefore Presents No Substantial Federal Question

Petitioner has cited a series of cases decided by this Court involving various prejudgement creditors' remedies (and one case involving administrative termination of social security disability benefits) as authority for its claim that the notice order violates its procedural due process rights. *Snaidach v. Family Finance Corporation,* 395 U.S.

337 (1969); *Fuentes v. Shevin,* 407 U.S. 67 (1972); *North Georgia Finishing, Inc. v. Di-Chem, Inc.,* 419 U.S. 601 (1975); *Mathews v. Eldridge,* 424 U.S. 319 (1976).

In each case, this Court determined whether the "deprivation" satisfied procedural due process requirements where *no* hearing was afforded the debtors (or social security claimant) prior to the deprivation (or discontinuance of the benefit).

None of the cases cited by Petitioner challenged temporary deprivation of property following a full, noticed hearing where the person whose property rights were to be affected had full opportunity to be heard and present any evidence relevant to the issue presented. None of the cases cited went further than requiring some type of notice and hearing prior to the sequestration or other temporary deprivation of property.

> Our past cases mandate that some kind of hearing is required at some time before a state finally deprives a person of his property interest. The fundamental requirement of due process is the opportunity to be heard and it is an "opportunity which must be granted at a meaningful time and in a meaningful manner." *Armstrong v. Manzo,* 380 U.S. 545, 552, 14 L.Ed.2d 62, 85 S.Ct. 1187 (1965). However, as many of the above cases recognize, we have rejected the proposition that "at a meaningful time and in a meaningful manner" *always* requires the state to provide a hearing prior to the initial deprivation of property. This rejection is based in part on the impracticability in some cases of providing any pre-seizure hearing under a state-authorized procedure, and the assumption that at some time a full and meaningful hearing will be available.

Parratt v. Taylor, 451 U.S. 527, 540-541, 68 L.Ed.2d 420, 101 S.Ct. 1908 (1981) (emphasis added).

Unless Respondents ultimately prevail in the trial court, Petitioner will be able to recover the amounts it has expended as its share of the cost of notice. No "permanent deprivation" of such funds will occur until there has been a full hearing on the merits. The procedure utilized to establish Petitioner's preliminary obligation to advance a portion of the notice cost provided more procedural protection than any decision of this Court has ever mandated as constitutionally necessitated. No substantial federal question is presented on this record.

In *Eisen v. Carlisle & Jacquelin,* 417 U.S. 156 (1974), this Court interpreted F.R.C.P. Rule 23 to require that costs of notice be advanced by the plaintiff, as part of the "ordinary burden of financing his own suit." In other situations, this Court has indicated that federal courts do have the power to shift costs incident to notice. *Oppenheimer Fund v. Sanders,* 437 U.S. 340, 57 L.Ed.2d 253, 98 S.Ct. 2380 (1978). Nowhere has this Court ever indicated that shifting the cost of notice to a defendant after a noticed hearing on the matter would violate a defendant's due process rights.

Both *Eisen IV* and *Oppenheimer v. Sanders* were decided under Federal Rule 23. *Oppenheimer v. Sanders* indicated that Rule 23, rather than the discovery rules, governed a federal court's discretion in apportioning costs of notice. Further, the holdings in *Eisen* and *Oppenheimer Fund v. Sanders* both suggest that the evaluation of whether to shift any of the costs incident to notice should rest on the federal policy that the notice does not benefit the defendant in a class action but is primarily for the benefit of the class representative.

The California trial court derives its authority to shift notice costs directly from legislative enactment. California

Civil Code Section 1781(d); *Civil Service Employees v. Superior Court,* 22 Cal.3d at 376. Moreover, under the California scheme it is the trial court and the defendant who primarily benefit from the sending of notice to class members. The court benefits by minimizing the burden of repeated suits over the same issue, and the defendant benefits by reducing or eliminating the possibility that it could obtain a judgment in its favor and not be able to apply that judgment to absent class members who have not received adequate notice. *Home Savings and Loan Association v. Superior Court,* 42 Cal.App.3d 1006, 1011-1012, 117 Cal.Rptr. 485, 488 (1975). Hence, California has permitted trial courts, in their discretion, to shift some or all of the cost of notice to the defendant, under the same principles that trial courts have shifted the initial cost of various other litigation expenses to either or both of the parties to the litigation. Commonly shifted litigation expenses in California include the compensation of court-appointed expert witnesses, the compensation of court-appointed translators, the compensation of court-appointed blood test experts, and reference expenses. *Civil Service Employees Insurance Company v. Superior Court,* 22 Cal.3d at 378-379.

The federal rules and California practice differ substantially in philosophy and procedure for class actions. Such differences in philosophy and practice represent not a constitutional infirmity but an inherent strength contemplated by the federal system. The Constitution does not mandate that state courts follow federal rules in their handling of class actions. *Hansberry v. Lee,* 311 U.S. at 42.

Petitioner's attack on the trial court's preliminary apportionment of notice costs does not raise any substantial federal question.

CONCLUSION

For the foregoing reasons, Respondents respectfully submit that this Court should dismiss Petitioner's appeal and/or deny Petitioner's Petition for Writ of Certiorari.

DATED: August 30, 1984

Respectfully submitted,
HILL, SCHWARTZ, STENSON & BOUTIN

By DAVID H. SCHWARTZ
Attorneys for Respondents

(Appendices follow)

Appendix A

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Attorneys for Plaintiffs.

In the Superior Court of the State of California
In and for the City and County of San Francisco

NO. 780 024

Joan Nosse, et al.,
Plaintiffs,

vs.

Volkswagen of America, Inc., et al.,
Defendants.

[Filed July 1, 1983]

DECLARATION OF SAMUEL A. KRANTZ RE COST OF NOTICE TO CLASS BY PUBLICATION

I, Samuel A. Krantz, hereby declare:

1. I am an member of the State Bar of California and have been employed by counsel for the plaintiffs herein to work on this case.

2. During the week of June 20, 1983, in response to an inquiry to plaintiffs' attorneys by the Court by Minute Order dated May 31, 1983. I conducted factual research on the most effective publication of class notice statewide in this action.

3. In the course of said investigation and research, I contacted Bruce Parker of the California Newspaper Service Bureau in Los Angeles, an agency which regularly arranges such statewide publications. Mr. Parker had an assistant prepare a list of newspapers actually published in each county, their total weekday circulation, and cost per inch for publication of a legal notice.

4. I also consulted a media marketing guide published in September, 1982 by the Standard Rate and Data Service, which detailed newspaper circulation in each county of California. Based upon this data and that received from the California Newspaper Service Bureau, I compiled a list of the major statewide newspapers on the basis of substantial circulation in their regional areas and whose circulation cumulatively penetrated into *every county* in California. The total circulation of the papers selected by this process is approximately 3,393,000 statewide.

5. I then contacted each of these newspapers and inquired into the cost of a one-eighth page advertisement to be run in their main section either for (1) one day, (2) three consecutive days, or (3) one day a week for three consecutive weeks.

6. The following data was obtained from these newspapers and my independent research for a one-eighth page advertisement. According to my research, at least one of these newspapers circulates in every county in California.

NEWSPAPER	CIRCULATION	COST: 1 DAY	COST: 3 CONSECUTIVE DAYS, OR ONCE A WEEK/ 3 WEEKS
Los Angeles Times	1,081,050	$2,880.00	$ 8,640.00
San Francisco Chronicle/ Examiner	684,937	2,553.00	7,659.00
San Diego Union	345,000	1,017.38	3,052.14
Sacramento Bee	228,764	789.60	2,368.80
San Jose Mercury	226,829	749.49	2,248.47
Oakland Tribune	183,065	484.61	1,417.71
Fresno Bee	153,977	612.36	1,723.68
Bakersfield Californian	150,500	369.60	1,108.80
Riverside Press	110,000	366.40	1,099.20
Redding Record Searchlight	34,000	106.80	319.20
TOTALS	3,392,886	$9,929.24	$29,637.00

7. Attached hereto for further illumination of the Court is a list of the major newspapers published in each county in California, compiled by California Newspaper Service Bureau, setting forth the cost of publication for one day. Also attached is a selected list of legal newspapers in each county in California, most of which are considerably cheaper than the major newspapers, obtained for "Legal Periodicals," pp. 63-031.

I declare under penalty of perjury that the foregoing is true and correct and that this Declaration was executed on June 29, 1983 at San Francisco, California.

/s/ SAMUEL A. KRANTZ

Samuel A. Krantz

Appendix B

Excerpt From Defendant's Memorandum Of Points And Authorities In Response To Plaintiffs' Motion For An Order Regarding Notice To Class and Allocation Of Cost Of Notice

III. PLAINTIFFS MUST BEAR THE COST OF PROVIDING NOTICE TO THE CLASS.

A. There Is No Basis For Shifting The Costs Of Notice To VWoA.

In *Civil Service Employees Ins. Co. v. Superior Court,* supra, 22 Cal.3d at 279, a four justice majority of the California Supreme Court took the position that the initial cost of class notice may be shifted to a defendant in an appropriate case without violating the due process clause.* The court concluded that trial courts may exercise discretion in light of "the wide range of factors that other courts have identified as relevant to the cost allocation decision" in determining whether to shift notice costs (id. at 380). The majority in *Civil Service* explained these factors as follows:

> * * * [W]e believe that no rigid rule as to the allocation of expense of notice is advisable and the better course is to decide the issue in each case on the basis of the relevant factors, including the apparent merit or lack of merit in the claim, the defendants desire to take advantage of the broader res judicata effect of a client's action, the number of named plaintiffs and their financial responsibility, the value and percentage of their holdings as compared with those of the entire class, the ability of plaintiffs to make the initial outlay required, and, of course, the cost of notice" (id. at 380, n. 10 quoting *Berland v. Mack* (S.D.N.Y. 1969) 48 F.R.D. 121, 131-132).

*As demonstrated, infra, *Civil Service* should be limited to its facts and is not directly applicable to the present case. Even under the criteria of *Civil Service,* however, it would be an abuse of discretion to shift notice costs in this case.

In addition to *Berland v. Mack,* supra, the court also cited two other decisions, *Cartt v. Superior Court,* supra, 50 Cal. App.3d 960, 974, n. 21* and *Lamb v. United Security Life Company* (S.D. Iowa 1972) 59 F.R.D. 25, as identifying the factors to be considered in the cost allocation decision (id., at 380). Two of these cases, *Berland,* and *Cartt* by quoting *Berland,* add plaintiffs' ability to reimburse the defendant as a relevant consideration. The other case (*Lamb v. United Security Life Co.,* supra, 59 F.R.D. at 39) clearly implies that the plaintiffs' ability to post a bond for reimbursement is a relevant consideration.**

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*Cartt, however, did not actually consider shifting costs of notice. The court of appeals in Cartt merely quoted a portion of *Berland v. Mack* in a footnote after citing the case as an example of a Federal decision that may be of value in California cases (id. at 974, n. 21).

**Contrary to the implication of plaintiffs' argument, the court of appeals did not hold in *Cartt* that the likelihood of renewed litigation is the "main consideration" to be weighed in cost allocation decisions (Pls.Memo. at 15). That case did not involve the issue of whether or not the cost of notice should be shifted to the defendant and did not evaluate the factors to be considered in making a cost allocation decision (*Cartt v. Superior Court,* supra, 50 Cal.App.3d at 974). The case only involved the issue of what *type* of notice must be sent to the class (id. at 973). The court expressly refused to consider the propriety of cost shifting.

> "As far as shifting all or part of the cost burden of giving notice to the defendant is concerned, probably the less we say about this problem at this time, the better" (id., pp. 974-975).

Plaintiffs' heavy emphasis upon the possibility of renewed litigation as the "main consideration" in the cost allocation decision thus lacks any basis whatsoever. Furthermore, plaintiffs' assertion that "this court should not be concerned with [the prospect of] multiple litigation" (Pls.Memo., p. 14) because "it doesn't even approach a remote possibility" belies the facts (Pls.Memo., p. 15). Plaintiffs allege damages from a defect in a valve stem seal which

Berland is the best guide for the standards to be applied in reaching a cost allocation decision. That decision explains:

> "Just as it would be unwise to frustrate the use of the class action devise by imposition of a rigid rule that plaintiffs must pay the cost of notice, so it would be equally unfair to adopt a rule that cost must be paid out of the corporate coffers * * *. To give a single member of a class who asserts a claim of doubtful merit the power to trigger such a substantial expenditure of corporate funds, without any assurance of joinder on the part of other class members, smacks of confiscation. Should the corporate defendant in such a suit prevail on the merits after laying out the initial expense of notice to the class, it would in most cases find it impossible to obtain reimbursement [citation omitted]" (*Berland v. Mack,* supra, 48 F.R.D. at 131-132).

Berland makes clear that notice costs should be shifted only in the most compelling case where the relevant factors strongly weigh in favor of the plaintiffs.

> "* * * where the claim's merit is doubtful, the cost of notice is high, the defendants have no particular desire to gain the advantages of a class res judicata and plaintiffs would be unable in the event of dismissal to reimburse the corporation, plaintiffs should be required to pay out the initial expense rather than obtain a 'free ride' at the corporation's expense" (ibid.).*

> "* * * causes excessive oil consumption, occasional engine seizure, excess wear and tear on other engine parts and other related engine problems" (Pls.Memo., p. 2).

The claims asserted on behalf of some of the individually named plaintiffs run into several hundred dollars. For example, Joan Nosse is claiming $1,200 in damages. (First Amended Complaint, ¶ 6a.) In view of the substantial size of the potential claims, there is a very real prospect of multiple litigation here (see, infra, pp. 22-23).

*The district court's opinion in *Lamb v. United Security Life Co.*, supra, 59 F.R.D. at 39, expresses a similar view.

Applying the relevant factors, the *Berland* court ordered the plaintiffs to pay the cost of mailing a copy of the notice to each identifiable class member (id. at 133) even though it found that plaintiffs' claims were prima facie meritorious, that defendants desired to have the suit declared a class action to take advantage of class res judicata, that the total cost of notice was relatively modest, and that the plaintiffs were in a financial position to pay some of the notice expense required (id. at 132-133).

The plaintiffs in this case make no convincing showing on the relevant factors. They must, therefore, be required to pay the cost of notice.

The first factor involves the merits of plaintiffs' claims. Plaintiffs originally alleged nine causes of action; the Court certified a class as to only five. However, even as to the certified claims there is doubtful basis for any finding in favor of plaintiffs on the merits.*

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*It is unlikely that plaintiffs will be able to prevail on any of the certified claims. For example, plaintiffs must establish privity between the members of the class and VWoA to prevail upon their express warranty theory. As the attached affidavit of Gerhard Riechel demonstrates, all of the subject vehicles were sold free and clear to franchise dealers for resale to their customers (Affidavit of Gerhard Riechel, ¶ 4, attached hereto as Exhibit A). Thus VWoA has never been in contractual privity with the class members. In order to prevail under their warranty theories, plaintiffs must prove buyer reliance upon representations made by defendant. Plaintiffs have been unable to make any such showing. Similarly, plaintiffs' causes of action for misrepresentation and concealment must fail in view of the absence of proof of any misrepresentation and reliance. The lack of merit in plaintiffs' claims is also reflected in the predominance of individual issues for each of their claims. For example, the fact of injury is an individual issue which remains to be proved in every case. Causation is also an individual issue that must be established for each class member. Indeed most, if not all, of the issues necessary to establish plaintiffs' various theories of liability are individual. Unique and varying defenses are available to each.

Plaintiffs seek to sidestep this gap in their showing by piggybacking their claims on settled or as yet undetermined Federal agency proceedings. They claim that the FTC issued a complaint against VWoA based upon similar allegations

> " * * * wherein the Commission has determined after investigation, that the FTC has 'reason to believe' that VWoA has violated the Federal Trade Commission Act, 15 U.S.C. § 45" (Pls.Memo., p. 15).

In addition, the EPA is said to have found that a substantial number of VW vehicles burned excessive oil because of valve stem seal defects. These claims are belied by the very exhibits plaintiffs use to support them.

The complaint of staff counsel for the FTC is hearsay. It is not a determination of the merits of any allegation. It is not even evidence of what it alleges, and it is improperly cited as such in plaintiffs' memorandum. The filing of the complaint merely initiates an action to be adjudicated before an administrative law judge. In any event, the FTC complaint makes no direct allegation of any specific technical defect and, in fact, suggests potential sources of oil consumption other than valve stem seals (see FTC complaint, ¶ 6A Plaintifs' Exh. D). Even an FTC determination on the merits adverse to VWoA would not necessarily resolve any of the issues in this case.

Plaintiffs' suggestion that the denial of the VWoA's motion for partial summary judgment in the FTC proceeding demonstrates the merits of their claims is specious. Neither of the orders relied upon by plaintiffs is a determination by the administrative law judge on the merits (Pls.Memo. at 16 and Exh. D thereto). In the first order the administrative law judge ruled that VWoA's motion for partial judgment was premature because the FTC had not yet obtained discovery of the designer and manufacturer of the engine in question. Complaint counsel argued

that they could not yet present sufficient factual evidence to oppose VWoA's motion.* It was solely upon this ground that the administrative law judge declined to dismiss the post-1979 and diesel vehicles from the complaint (ibid.). The other order simply found the FTC has in personam jurisdiction over Volkswagenwerk Aktiengesellschaft (ibid.), an entity which plaintiffs voluntarily dismissed from this suit prior to class certification.

Plaintiffs suggest that a more important factor demonstrating the merits of their claims is that

> " * * * the Environmental Protection Agency (hereinafter, 'EPA') has, in October 1980 issued a Notice of Non-Conformity Finding and Order re: Remedial Plan indicating that a substantial number of VWoA vehicles, (makes and models involved in this class action lawsuit) was *because of excessive oil burning due to valve stem seal defects,* polluting in excess of federal standards" (Pls. Memo., p. 16) (emphasis added).

This representation of the EPA's action is wrong. The Notice and Order reads, in relevant part, as follows:

> "We believe that the NOx [oxgides of nitrogen] nonconformity in [the smaple of ten test] vehicles is caused by a defect in the Exhaust Gas Recirculation (EGR) system. Many vehicles were observed to have

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*Complaint counsel's opposition was analogous to that permitted under Rule 56(f) of the Federal Rules of Civil Procedure. Under that Rule, a party may defeat a motion for summary judgment through the presentation of affidavits demonstrating that he cannot present by affidavit facts essential to justify his opposition due to the need for further discovery on the issues raised in the motion. Indeed, in his order, the administrative law judge expressly found that complaint counsel "cannot precent by affidavits facts essential to justify their opposition to respondents' [summary judgment] motion," i.e., a colorable case against VWoA. (Order Denying Respondents Motion for Partial Summary Judgment, p. 2, Plaintiffs Exh. D.)

> deposits on the EGR valves which caused the valves to become inoperative and prevent exhaust gas recirculation.
>
> * * * At this time the cause of the [hydrocarbon] non conformity has not been determined" (Attachment 1 to plaintiff's Exh. E.)

The EPA's Notice and Order do not discuss or even mention valve stem seals and were not based upon a finding of excessive oil burning.*

As to the second *Civil Service* factor, this is most definitely not a case in which the defendant welcomes or only nominally opposes class certification in order to take advantage of the binding effect of final judgment (compare *Berland v. Mack,* supra, 48 F.R.D. at 133). Here, VWoA vigorously opposes class certification and is currently challenging the certification order in the court of appeals. These actions reflect VWoA's "rather weak interest in res judicata advantage" through its "strenuous resistance" to class certification *(Lamb v. United Security Life Co.,* supra, 59 F.R.D. at 41).

Plaintiffs' attempted showing as to their financial responsibility, or lack thereof, has been stricken from the record following their refusal to allow VWoA any discovery on the issue. Thus, the only information before the Court relevant to the four remaining *Civil Service* factors is the First Amended Complaint which names the six plaintiffs and the statement of plaintiffs' counsel that "[l]itigation costs are being met adequately" (Declaration of William Weiner In

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*The issuance of such a Notice and Order, if contested, amounts to no more than a complaint initiating administrative proceedings. 40 C.F.R. § 851807.

Support of Plaintiffs' Motion For Class Certification, ¶ 9).* Based upon this record, each of the remaining factors must be determined against plaintiffs.**

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*If there is an inclination to impose notice costs on defendant, plaintiff's financial capability to reimburse or secure such costs is not only an appropriate, but an essential subject of discovery and hearings (see, e.g., *Berland v. Mack*, supra, at 131-132).

**Although plaintiffs initiated this class action on behalf of an estimated 200,000 people, they are unwilling to pay for any portion of the cost of providing notice. The imposition of this cost upon VWoA will, for all practical purposes, constitute a permanent deprivation. The chance of a successful class action defendant recovering notice costs advanced to the class members after the entry of judgment is virtually nonexistent (see *Cartt v. Superior Court, supra,* 50 Cal.App.3d at 975, fn. 22). Consequently, plaintiffs should be required to post an appropriate bond in the event VWoA is ordered to pay all or part of the costs of notice to protect VWoA's interests.

A plaintiff obtaining an injunction is required to post a bond or other security for damages that the defendant may sustain as a result of the injunction. (Code Civ. Proc., § 529). The purpose of this requirement is to protect the defendant from loss in the event it is ultimately determined that the injunction was wrongfully issued. Where, as here, the plaintiffs seek an order requiring the defendant to advance large sums prior to a determination on the merits, a similar undertaking should be required to protect the defendant's interests.

Appendix C

Excerpt From Appendix 12 To Defendant's Petition For Writ Of Mandate And Memorandum In Support Thereof

VOLKSWAGEN
OF AMERICA, INC.
Englewood Cliffs
New Jersey 07632

ATTENTION: SERVICE MANAGER

SUBJECT: Service Program MQ

Dear Dealer Service Manager:

Enclosed is the complete MQ service program package which includes the following material:

— Service Program Circular
— Copy of Customer Notification
— Work Procedure
— Accounting Procedure
— Time Requirement Explanation
— Copy of Questionnaire/Refund Claim Form

A) *Service Program Circular*
Outlines all pertinent aspects of the service program.

B) *Customer Notification*
VWoA's mailing will be as follows:
— letters to customers of 49 State vehicles
— letters to customers of California equipped vehicles
— letters to customers of California equipped vehicles which have had already new valve stem seals installed and for which VWoA has paid.

EXHIBIT B TO FURTHER RESPONSE TO INTERROGATORY NO. 1—SECOND SET

C) *Work Procedure*
Outlines the sequence of steps to be taken to replace the valve stem seals without removing the cylinder head, utilizing the specially developed tool kit, part number US 4498, which has been supplied to you free of charge.

D) *Accounting Procedure*
Describes the various time allowances and applicable reimbursement codes.

E) *Time Requirement Explanation*
Detailed explanation of time requirement study.

F) *Questionnaire and Refund Form*
Customers who have had the new type valve stem seals installed already and have paid for this repair, are eligible for a refund of up to $125.00 from VWoA. However, in order to qualify, customers are being asked to submit to you or your staff a paid invoice or other evidence. We request that you verify the repair, complete the questionnaire and suggest to the owner that he should return the completed questionnaire to VWoA.

Thank you for your cooperation.

Sincerely,

VOLKSWAGEN OF AMERICA, INC.
/s/ F. X. KAMMERBAUER
F. X. Kammerbauer
Manager,
Technical Services

JvH/lss
enclosure

February 5, 1982

SUBJECT: Service Program MQ

Gentlemen:

VWoA will commence a service program involving 1977 through 1979 model CIS equipped Rabbit and Scirocco vehicles which is designed to reduce emissions as well as oil usage.

Customer Notification

First Class mail notification of owners will begin February 15, 1982. Copy of owner notification letter is enclosed. Vehicle allocation list containing names and address of owners residing in your area of responsibility will be sent to you prior to owner notification.

Work Procedure

49-State Vehicles:

(a) install vacuum control valve to delay advance of ignition system and plug two vacuum ports of EGR system.

(b) if oil consumption is of concern to the owner, replace OEM intake and exhaust valve stem seals. Seals which have already been replaced after July 1, 1979 should *not* be replaced again. Only Viton seals were available since July 1979.

California Vehicles:

Perform work procedure described in (b) only. Do not modify EGR and ignition system.

Detailed work instructions are enclosed.

Parts Requirements:

Necessary parts will be shipped to you automatically prior to February 15, 1982.

The individual parts required for this action are as follows:

8	Valve Stem Seals (Package of 8 plus 2 installation sleeves)	035 109 675
1	Sealing Strip	056 103 489A
1	Gasket	056 103 483C
1	NOx Kit	200 198 101

Time Allowance and Accounting Procedure:

New tool set No. US 4498 will automatically be shipped free of charge to you. Use of this tool set simplifies removal of valve assembly and valve stem seals, and saves time. Time allowance and accounting procedures are enclosed.

Identification of Service Program Completion:

Pre-printed completion identification labels will be supplied to you together with your vehicle allocation list. Please insert your dealer number with a typewriter or non-erasable pen and affix label to left front door jamb. Make sure that area is cleaned where label is to be affixed.

Sincerely,

VOLKSWAGEN OF AMERICA, INC.
/s/ F. X. KAMMERBAUER
F. X. Kammerbauer
Manager,
Technical Services

JvH/lss
enclosure